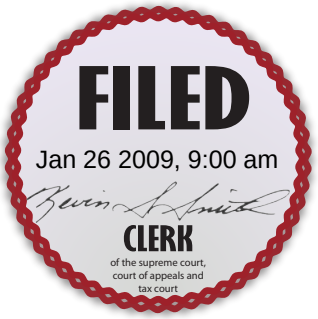

ATTORNEY FOR APPELLANT:

MICHAEL B. TROEMEL
Lafayette, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

SHELLEY JOHNSON
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ROBERT COWGER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0810-CR-909
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-0802-FA-6

January 26, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Robert Cowger appeals his forty year sentence for Class A felony neglect of a dependent. We affirm.

Issue

Cowger raises one issue, which we restate as whether he was properly sentenced.

Facts

On the evening of February 7, 2008, and the morning of February 8, 2008, Cowger was caring for his young daughter, K.C., who was born on November 18, 2007. While caring for K.C., Cowger became frustrated because she was crying. At one point, he shook her "pretty hard" and dropped her. Tr. p. 15. K.C. hit her head and died from her injuries.

On February 13, 2008, the State charged Cowger with Class A felony neglect of a dependent. Cowger pled guilty, and pursuant to his guilty plea, his executed sentence was capped at forty years. The trial court sentenced Cowger to forty years executed, and he now appeals.

Analysis

Cowger argues that his sentence is inappropriate and claims that the trial court improperly found three aggravating circumstances. We engage in a four-step process when evaluating a sentence. Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007). First, the trial court must issue a sentencing statement that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." Id. Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse

of discretion. Id. Third, the weight given to those reasons, i.e. to particular aggravators or mitigators, is not subject to appellate review. Id. Fourth, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). Id.

Even if a trial court abuses its discretion by not issuing a reasonably detailed sentencing statement or in its findings or non-findings of aggravators and mitigators, we may choose to review the appropriateness of a sentence under Rule 7(B) instead of remanding to the trial court. See Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007). Further, as we recently reiterated, "inappropriate sentence and abuse of discretion claims are to be analyzed separately." King v. State, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008).

An abuse of discretion in identifying or not identifying aggravators and mitigators occurs if it is "'clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.'" Anglemyer, 868 N.E.2d at 490 (quoting K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006)). Additionally, an abuse of discretion occurs if the record does not support the reasons given for imposing a sentence, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. Id. at 490-91.

The first aggravator Cowger challenges is his criminal history. He claims the trial court abused its discretion in considering this aggravator because it is non-violent and is wholly unrelated to the instant charges. In sentencing Cowger, the trial court stated, "The

defendant has a history of juvenile delinquency and was on juvenile probation at the time of the offense." App. p. 56.

Cowger's juvenile delinquency history includes allegations of residential entry, truancy, theft, attempted theft, and criminal mischief. Although this criminal history is not that extensive or violent, he has been involved in the criminal justice system since he was eleven years old and he committed this offense when he was only eighteen. Because the record supports the trial court's conclusion that Cowger had a criminal history and that he was on probation when he committed this offense, the trial court did not abuse its discretion in considering it as an aggravator.

As our supreme court has observed, the significance of one's criminal history "varies based on the gravity, nature and number of prior offenses as they relate to the current offense." Wooley v. State, 716 N.E.2d 919, 929 n.4 (Ind. 1999). Cowger's challenge appears to be based on the weight given to his criminal history. Such a challenge is not subject to review for an abuse of discretion. See Anglemyer, 868 N.E.2d at 491 ("Because the trial court no longer has any obligation to 'weigh' aggravating and mitigating factors against each other when imposing a sentence, unlike the pre-Blakely statutory regime, a trial court can not now be said to have abused its discretion in failing to 'properly weigh' such factors."). Cowger has not established the trial court abused its discretion in considering his criminal history as an aggravator.

Cowger also challenges the trial court's consideration of his relationship with K.C. as an aggravator. He claims that his care-giving relationship with K.C. is an element of

the offense and that "[i]t is well established that an element of a crime should not serve as an aggravator." Appellant's Br. p. 15.

Initially, we are not convinced that the trial court's consideration of Cowger's "position of trust, having care, custody and control of the victim" is an element of the offense. App. p. 56. The statute describes "[a] person having the care of a dependent." Ind. Code § 35-46-1-4(a). Cowger was more than K.C.'s caretaker, he was her father. Cowger's relationship with K.C. went beyond the statutory element of the offense and was a valid aggravator.

But even if, as Cowger argues, the trial court considered an essential element of the offense as aggravating, under the current sentencing scheme the trial court was not "enhancing" his sentence. It was within the trial court's discretion to consider an element of the offense as aggravating. See Pedraza v. State, 887 N.E.2d 77, 80 (Ind. 2008) ("Under the 2005 statutory changes, trial courts do not 'enhance' sentences upon finding such aggravators. Consequently, we conclude that when a trial court uses the same criminal history as an aggravator and as support for a habitual offender finding, it does not constitute impermissible double enhancement of the offender's sentence."); see also Ind. Code § 35-38-1-7.1(d) ("A court may impose any sentence that is: (1) authorized by statute; and (2) permissible under the Constitution of the State of Indiana; regardless of the presence or absence of aggravating circumstances or mitigating circumstances."). The trial court did not err in considering Cowger's relationship with K.C. as an aggravator.

Finally, Cowger challenges the trial court's observation that, "The victim's family recommends aggravation of the sentence, and the Court notes the effect the death of the infant had on the victim's family."[1] App. p. 56. Our supreme court has previously observed:

> under normal circumstances the impact upon family is not an aggravating circumstance for purposes of sentencing. The impact on others may qualify as an aggravator in certain cases but "the defendant's actions must have had an impact on . . . 'other persons' of a destructive nature that is not normally associated with the commission of the offense in question and this impact must be foreseeable to the defendant."

Bacher v. State, 686 N.E.2d 791, 801 (Ind. 1997) (citations omitted).

Even assuming that this is still an improper aggravator under the new sentencing scheme, we disagree with Cowger's argument that although the family experienced pain that cannot be described in words, "it is the kind of pain which one would generally associate with the commission of this crime." Appellant's Br. p. 16. To the contrary, Cowger, frustrated with his own child's crying, shook and dropped K.C., who was less than three months old. Cowger was living with K.C.'s mother, who was at work at the time of the offense. Given Cowger's relationship to K.C. and her family and K.C.'s very young age, the impact of K.C.'s death on K.C.'s family was more destructive than that normally associated with the commission of this type of offense. This impact was

[1] In his guilty plea, Cowger expressly agreed, "Family members of the victim and representatives from social services including the DCS may make sentencing recommendations." App. p. 8. Because the State makes no argument that agreeing to such a term precludes a challenge to the consideration of family members' sentencing recommendations on appeal, we address the issue on the merits.

foreseeable to Cowger. The trial court did not abuse its discretion in considering this aggravator.

Cowger also argues that his forty-year sentence is inappropriate in light of the nature of the offense and the character of the offender. See Ind. Appellate Rule 7(B). Although Indiana Appellate Rule 7(B) does not require us to be "extremely" deferential to a trial court's sentencing decision, we still must give due consideration to that decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. "Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate." Id.

In terms of the nature of the offense, out of frustration, Cowger shook and dropped his daughter who was less than three months old because she "cried a lot." Tr. p. 15. We need not explain how appalling this offense is.

As for Cowger's character, we recognize that he pled guilty but mentally ill, which was based on a diagnosis of mild mental retardation and major depressive disorder. The psychologist's report stated that Cowger's low IQ "contributed to his low capacity for sound judgment and consideration of the consequences of his actions." Green App. p. 17. The report also stated, "While his developmental immaturity clearly does not excuse for [sic] his behavior, it should be considered for mitigation." Id. Regarding the major depressive disorder, the psychologist observed that Cowger had suffered from this condition since his early adolescence and stated that "it likely served to further erode his already diminished parenting abilities." Id. at 18.

In determining the manner in which mental illness affects sentencing decisions our supreme court has observed:

> The American Psychiatric Association's definitions of mental illness, contained in the Diagnostic and Statistical Manual of Mental Disorders (presently "DSM-IV-TR") have continued to expand to the point that a recent study declared that about half of Americans become mentally ill and half do not. This suggests the need for a high level of discernment when assessing a claim that mental illness warrants mitigating weight. In Weeks v. State, we laid out several factors to consider in weighing the mitigating force of a mental health issue. Those factors include the extent of the inability to control behavior, the overall limit on function, the duration of the illness, and the nexus between the illness and the crime.

Covington v. State, 842 N.E.2d 345, 349 (Ind. 2006) (citation and footnote omitted).

We do not doubt that Cowger's mental illness affected his judgment and ability to understand the consequences of his actions. Nevertheless, as the psychologist recognized, Cowger's mental health issues do not excuse his behavior. Although mitigating, Cowger's mental illness does not obviate the horrific nature of the offense. This, too, can be said of Cowger's guilty plea. By pleading guilty, Cowger accepted responsibility for his actions, but he also was guaranteed to receive a sentence ten years less than the maximum sentence for a Class A felony. Despite Cowger's mental illness and guilty plea, the death of his infant daughter was tragic. Under these circumstances, we cannot conclude that Cowger's sentence was inappropriate.

Conclusion

Cowger has not established that the trial court abused its discretion in considering various aggravators or that his sentence is inappropriate. We affirm.

Affirmed.

BAILEY, J., and MATHIAS, J., concur.